THE LEGISLATURES AND THE COURTS:

THE POWER TO DECLARE STATUTES UNCONSTITUTIONAL.

WHEN the question of the adoption of the constitution of 1787 was under discussion in the Virginia convention, Patrick Henry declared that he took it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, were liable to be opposed by the judiciary. This power by which the courts disregard the acts of the legislature and declare them null and void because contrary to the supreme law of the constitution has been a source of endless wonder to foreign students of our system of government. "No feature in the government of the United States," says Professor Bryce, "has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution."[1]

In speaking of this subject Sir Henry Maine says,

> The success of this experiment has blinded men to its novelty. There is no exact precedent for it either in the ancient or in the modern world. The builders of constitutions have of course foreseen the violation of constitutional rules, but they have generally sought for an exclusive remedy not in the civil but in the criminal law, through the impeachment of the offender; and in popular government, fear or jealousy of an authority not directly delegated by the people has too often caused the difficulty to be left for settlement to chance or to the arbitrament of arms.[2]

[1] American Commonwealth, I, 237. See Brougham's Political Philosophy, III, 337. As an illustration of this admiration and misunderstanding, I quote the following from Prof. J. E. Thorold Rogers' recent work, The Economic Interpretation of History, 344: "The American constitution even protects its citizens against legislation which is asserted to be just, for the Supreme Court can on appeal reverse and annul any act of the federal legislature which it declares to be unconstitutional."

[2] Popular Government, p. 218.

While the doctrine can exist only in a government where there is a division of powers and a written constitution, it is not, as is often asserted, the necessary outgrowth of such a system. There are many nations now living under written constitutions, but this power seems to be confined exclusively to the American courts. The question has been much discussed by jurists in Germany and Switzerland, and while there are not wanting those who claim the power for certain courts in both these countries, the current of theory and practice is the other way. In Spain the supreme judicial tribunal may try cabinet ministers, but cannot set aside a royal decree. In France the Court of Cassation cannot question the validity of a law which has passed the Senate and the Chamber of Deputies. In Germany a law passed by the Federal Council and the Imperial Diet is beyond the reach of the Imperial Court. In Switzerland the supreme federal judicial power is vested in the Federal Tribunal, the members of which are appointed by the federal legislature. Under the constitution of 1848 there was an appeal on questions of public law to the Federal Council, from which there was a further appeal to the Federal Assembly. If the two chambers agreed, the decision was final; but if they disagreed, the decision of the Federal Council prevailed. This system was found unsatisfactory, as a large part of the time of the chambers was occupied in the discussion of mixed questions of law and politics. When the constitution of 1874 was adopted, this was in a measure remedied by providing for an appeal to the Federal Tribunal, which now has appellate jurisdiction over (1) conflicts of competency between federal and cantonal authorities; (2) disputes between cantons involving questions of public law; (3) certain claims for violation of rights of citizenship; (4) federal laws passed in execution of the federal constitution; (5) claims for violation of concordats between cantons and treaties with foreign countries.[1] Generally, if a cantonal law violates the federal constitution or a federal law, the Federal Tribunal will declare it invalid,[2] but in some cases recourse

[1] Adams and Cunningham, The Swiss Confederation, 73, 260.

[2] Jellinek, Gesetz und Verordnung, 401.

must be had to the Federal Council. The federal legislature is the sole judge of its own powers, and the courts must enforce every law passed by it even though it violates the constitution.[1] All such laws are adopted by the people either tacitly or through the *referendum*, and the judiciary must submit their judgment on constitutional questions to the will of the people.

The jurists of Belgium maintain, in theory, that an act of parliament opposed to the constitution should be disregarded by the courts; but during almost sixty years of Belgian independence the power does not appear to have been exercised.[2] The continental statesmen have preferred to trust to the efficacy of declarations of rights and the restraining power of public opinion, rather than permit the courts to pass upon political questions. By such means they have attempted to confine legislative power within very narrow limits, without making any provision for rendering unconstitutional legislation of no effect.

The germ of the principle established in American constitutional law is found in the English law. The judiciary is an offshoot from the executive; it developed slowly from absolute dependence to comparative independence. Montesquieu, who found his ideal in the English constitution, appreciated the subordinate position of the judiciary as compared with the executive and legislature, remarking that "of the three powers above mentioned, the judiciary is in some measure next to nothing." Lord Bacon advised his ideal judge to consult with the king and the state, "to remember that Solomon's throne was supported with lions on both sides. Let them [the judges] be lions, but lions under the throne, circumspect that they do not check or oppose any points of sovereignty." [3]

The English people worked out their freedom through this subordinate judiciary. And while there were many instances of corrupt and subservient courts, the contests maintained by

[1] Dubs, Das öffentliche Recht der schweizerischen Eidgenossenchaft. (Zurich, 1878.) Soldan, Du recours de droit public au Tribunal Fédéral. Supplément du *Journal des Tribunaux* (Bâle, 1886).

[2] But see Giron, Le droit public de la Belgique, pp. 129–158.

[3] Essay of Judicature.

the judges with the crown form some of the brightest chapters in English history. It required the loftiest courage to balance the scales of justice between the crown and the people. The judges were dependent for their offices upon the pleasure of a king whose prerogative was vague and uncertain. It was difficult to reconcile the acts of a tyrannical monarch with the principle that the king could do no wrong; yet this principle was the means by which the power of the courts was so extended as to permit them to inquire into the validity of acts of the government. As the king could not be presumed to have commanded a violation of law, an illegal act was treated as the act of a minister, who was not allowed to plead the command of the king in bar. Thus the violation of law was punished, and the dignity of the crown preserved.[1] The struggle between the crown and the people seeking in the courts a remedy for arbitrary violations of law was long and bitter, and ended only with the revolution of 1688, which definitely limited the royal prerogative. In 1769, Wilkes obtained a verdict of four thousand pounds against Lord Halifax, secretary of State, for illegally issuing a general warrant under which the plaintiff was arrested, his house searched and his papers seized.[2] It was through this course that the judiciary ascended to the level of the executive, and thus established a practical and effective check upon the arbitrary acts of the crown. But from the nature of the government no such control could be obtained over the legislature. A legislative act, being the joint act of crown, lords and commons, was a sovereign act and beyond control. A few eminent judges have, indeed, claimed for the English courts power to limit this absolute supremacy of Parliament, but it was never generally admitted and is inconsistent with the theory of the British constitution.[3] It remained for the colonists to carry the principle of judicial control further and apply it to legislative as well as to executive acts.

[1] Hare's Constitutional Law, I, 136. For an analogous principle in reference to American commonwealths, see Poindexter *vs.* Greenhow, 114 U. S. 290.

[2] See Wilkes *vs.* Wood, 19 State Trials, 1153; Entinck *vs.* Carrington, 19 State Trials, 1029. *Cf.* Boyd *vs.* U. S., 116 U. S. 616, 626.

[3] Coke declared: "The Common Law doth control acts of Parliament and adjudge

II.

The colonists received their legal system from the mother country and with it the same general ideas of the powers and duties of the courts. When they came to lay the foundation upon which to build new governments, they did not break with the past, but adopted a judicious course of selection and elimination. That this was in a measure involuntary is evident from the fact that while they "talked like rank democrats, they acted like progressive Englishmen." They were familiar with the constitutional system of the mother country and with the history of the long years of struggle and conflict out of which it had been evolved. They had no faith in the theory that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a "new suit of flesh and skin." "They had," says Mr. Bryce, "neither the rashness nor the capacity for constructing a constitution *a priori*." As Lowell eloquently puts it: "They knew that it is only on the roaring loom of time that the stuff is woven for such a vesture of their thoughts and expressions as they were meditating."[1] They reproduced, as far as was consistent with their circumstances, what they conceived to be the English constitutional system. In the texture of their minds they were Englishmen, perfectly satisfied with the English system of gov-

them when against common right to be void." Dr. Bonham's Case, 8 Rep. 114, note. Chief Justice Hobart declared, that an act of Parliament is void, if against natural equity. Hobart's Reports, 14. Lord Mansfield, when solicitor-general, argued that the common law that works itself pure by rules drawn from the fountain of justice is for this reason superior to an act of Parliament. 1 Atk. 33. But such doctrines were not kindly received by Parliament. Sir Thomas More was beheaded for affirming in private that there were some things Parliament could not do: "For example, no Parliament could make a law that God should not be God; no more could it make the King the supreme head of the church." There is an indirect way in which the courts limit the effect of Parliament's omnipotence. A court of equity may restrain a party from applying to Parliament for private legislation, where such legislation would be unjust. It will not permit parties to make a wrongful use of the right of petition. This jurisdiction is deduced from the special obligation the party is presumed to be under not to prefer a petition. See remarks of Lord Cottenham, in Stockton, *etc.* Ry. Co. *vs.* Leeds, *etc.* Ry. Co., 2 Phill. 670.

[1] Essay on Democracy.

ernment and imbued with English ideas, but driven into nation-building by the acts of a misguided Parliament. They were not rebelling against English law but against English statesmen.[1] Hence in the system of government finally adopted, the great principles of English freedom were carefully preserved. There was no intention of abandoning Magna Charta, the acts of the Long Parliament and the Declaration of Rights. The principles preserved in these instruments were merely carried one step onward in the process of evolution to the Declaration of Independence and the constitution of 1787.[2]

Consequently we find in the new government the same general division of powers into executive, legislative and judicial, with the addition of a system of checks and balances which experience with arbitrary power had shown to be necessary. Here a step in advance was taken and a new and original idea in political science was introduced and applied: the judiciary was made a co-ordinate department of government, while retaining, as a matter of course, all the judicial powers which belonged to it in England and in the colonies. With the judicial system came the rules of the common law, as far as applicable to the changed conditions; with the common law came the doctrine of precedent. So far, this was simply transplanting and adopting the law to which the colonists were accustomed, and which they considered the best legal system in the world. But the change in the form of government from a monarchy to a republic rendered necessary a change in theory as to the location of sovereignty. The absolute authority of Parliament as sovereign was now transferred to the people, and the restraints which applied to the executive in the English system became applicable to the new government as a whole.[3]

[1] Brougham's Political Philosophy, III, 326.

[2] In the language of a recent writer, "The English colonies in America, which were finally transformed into independent commonwealths through their severance from the mother country, were in a legal and constitutional sense involuntary and unconscious reproductions of the English kingdom, — inevitable products of a natural process of political evolution." Hannis Taylor, The Origin and Growth of the English Constitution, 77.

[3] See the language of Mr. Justice Matthews in Poindexter *vs.* Greenhow, 114 U. S. 270, 290.

The traditional powers of government fell naturally to the three departments, executive, legislative and judicial.[1] These departments were to exercise delegated powers,[2] defined and limited by a *lex legum* or over-law. These delegated powers must be exercised in conformity to the will of the sovereign or principal, as expressed in the instrument conveying the grant. Each department in exercising the power delegated to it acts for the sovereign, and is necessarily independent of any and all other departments. This principle of agency applies to both the national and the state governments, the former exercising such power as is expressly or impliedly granted by the national constitution; the latter all power not forbidden to them by the state or federal constitutions. The change in location of the sovereignty resulted in raising the judiciary to the position of a co-ordinate department of government, and the application of the established principles of the common law secured to it a controlling influence over the other departments. The interpretation of the supreme law, being a judicial act, belonged to the judiciary.

This doctrine is of course the outgrowth of a written constitution and a federal system of government; but the form of government alone will not account for its general acceptance. Only a law-observing people will regard the decision of an action as equivalent to the repeal or enactment of a law. The American people were a constitutional people strongly imbued with the legal spirit. They brought with them to America "the elixir of constitutions" and an inborn reverence for the constable's staff, — possessions which, in the language of Carlyle, had cost England "much blood and valiant sweat of brow and brain for centuries long in achieving." They came from a race accustomed to settling difficulties on legal lines. In the great debates of English history, as Macaulay says, there is not a word about Brutus the elder or Brutus the younger.

[1] "A legislative and an executive and a judicial power comprehend the whole of what is meant by government." John Adams, Works, IV, 186.

[2] Sovereignty itself cannot be alienated, but its exercise can be delegated. See Jameson's Constitutional Conventions, § 20; Lieber, Political Ethics, I, 251.

All questions of liberty and freedom have been argued as matters of law and not of expediency. On the question of the vacancy of the throne Somers and Nottingham argued as on a demurrer. The people always felt that if the law could but be discovered, it must necessarily be sufficient for their protection. This legal spirit — this inborn habit of submission to law and the consequent respect for the courts — is essential to the success of a federal system of government; and when it exists, the prominence of the judiciary in the constitution is assured. The law courts become the pivots upon which the constitutional arrangements turn, and the judges become not only the guardians but the masters of the constitution.[1]

The forces at work in society at a given time are not ordinarily understood or appreciated by the people, and the founders of our government did not anticipate the part the judiciary was to play in the new system. To many it seemed the weakest of the three departments. Elevating it to equal rank with the executive and legislature, though in the line of natural development, was an experiment, and it was reasonable to anticipate that the new department would be most liable to encroachment. Neither Madison nor Hamilton, both of whom expected the courts to exercise the power of declaring laws unconstitutional, appreciated the mighty force passing into the hand of the hitherto subordinate power. Hamilton wrote:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be least dangerous to the political rights of the constitution; because it will be the least in a capacity to annoy or injure them. . . . The judiciary is beyond comparison the weakest of the departments of power; it can never attack with success either of the other two, and all possible care is requisite to enable it to defend itself against their attacks.[2]

This seems to have been a protest against a certain jealousy of the new department felt by the people and by some few prominent men, easily traceable to the history of the immediate times.

[1] Dicey, *The Law Quarterly*, January, 1885; *cf.* also his Law of the Constitution, 167.

[2] *The Federalist*, No. 78.

Several years after the organization of the government, Wilson, then a judge of the Supreme Court, alluded in a public lecture to the existing jealousies and prejudices against the executive and judicial departments, and traced them to the habits of mind acquired before the Revolution, when these departments were under the control of those in no way responsible to the people.[1] They had become objects of distrust because derived from a foreign source, regulated by foreign maxims and directed for foreign purposes, while the legislature was looked to as the chosen guardian of the liberties and political hopes of the people.[2]

III.

The natural result of the contest with parliamentary power was a disposition on the part of the colonists to look with favor upon any legal or constitutional principle which would limit that power. Consequently, we find the colonial lawyers and statesmen accepting the untenable theory of Coke and Hobart. All fear of the courts was lost sight of for the time. In his famous argument on the writs of assistance, James Otis maintained that an act of Parliament "against the constitution is void; an act against natural equity is void; and if an act of Parliament should be made in the very language of this petition, it would be void."[3] John Adams wrote to Mr. Justice Cushing in 1776: "You have my hearty concurrence in telling the jury the nullity of acts of Parliament. I am determined to die of that opinion, let the *jus gladii* say what it will."[4] This seems to have been the prevailing opinion when in 1779 Massachusetts framed what became the model for the various state constitutions. In this memorable instrument is found the first embodiment of the conception of three co-ordinate departments

[1] Wilson's Works, I, 397.

[2] "Sir," said John Randolph, "I can never forget that in the great and good Book, to which I look for all truth and all wisdom, the book of Kings succeeds the book of Judges."

[3] Quincy's Reports, 474; Tudor's Life of Otis, 62.

[4] Works of John Adams, IX, 390.

of government. With the preconceived idea of the judicial power, it was inevitable that the duty of construing and protecting the new constitution should fall to the courts; and this seems to have been the intent of the men who drafted the constitution.[1]

The credit of the first of the long line of decisions by which this doctrine was established in our constitutional law belongs to Chief Justice Brearley and his associates on the bench of the supreme court of New Jersey. The case of Holmes *vs.* Walton[2] antedates all others. It was brought by writ of *certiorari* before the supreme court September 9, 1779, and was argued on constitutional grounds November 11 of the same year. The court held the matter under advisement over three terms and on September 7, 1780, the judges[3] gave their opinions *seriatim* for the plaintiff in *certiorari*.[4] In anticipation of the final decision, the legislature amended the statute in question.[5] This decision was followed in 1796 in the case of Taylor *vs.* Reading,[6] and again in 1804 in The State *vs.* Parkhurst.[7] The very interesting case of Trevett *vs.* Weeden[8] was decided in Rhode Island in 1786. It has been frequently cited as the first case in which the courts held an act of the legislature unconstitutional and void on the precise ground of conflict with the fundamental law.[9] But this seems to be an error. The point was raised and argued and attracted much

[1] Adams, The Emancipation of Massachusetts, ch. x.

[2] Referred to in State *vs.* Parkhurst, 4 Halstead (N. J.), 444.

[3] Brearley, Smith and Symmes.

[4] See Dr. Austin Scott, Papers of the American Historical Association, vol. II, p. 46.

[5] Laws of N. J. (orig. ed.) 49; 4 Halstead, 444. Gouverneur Morris wrote to the Pennsylvania legislature in 1785: "In New Jersey the judges pronounced a law unconstitutional and void. Surely, no good citizen can wish to see the point decided in the tribunals of Pennsylvania. Such power in judges is dangerous, but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away." Sparks' Life of Gouverneur Morris, III, 438.

[6] 4 Halstead, Appendix, 440. [7] 4 Halstead, 427.

[8] Trevett *vs.* Weeden; Pamphlet by J. B. Varnum (Providence, 1787). No reports were published in Rhode Island or New Jersey at this time.

[9] Cooley, Constitutional Limitations (4th ed.), 196; Bryce, The American Commonwealth, I, 532; Fiske, The Critical Period of American History, 175–6; McMaster, History of the People of the U. S., I, 337–9; Arnold, History of Rhode Island. II, 24.

attention; but the action was dismissed for want of jurisdiction, and the constitutional question was not decided.[1]

This case is of much historical interest. The legislature had passed one of the numerous tender laws of the period, for the purpose of forcing the people to accept the paper money of the state at its face value. A heavy penalty was attached to the refusal to accept this money, and it was provided that the trial for the offense should be without a jury. The discussion of the question of constitutionality roused the legislature in defence of its threatened supremacy and, in language which leaves no doubt as to the legislative conception of the relative dignity and importance of the two departments, the judges were summoned to appear and explain their action.[2] Three of the judges obeyed this summons, but the other two pleaded sickness and the hearing was postponed. Mr. Justice Howell, in an elaborate speech delivered before the legislature in defence of the court, remarked that "the order by which the judges were before the house might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial

[1] The judgment of the court was as follows: "Whereupon, all and singular the premises being seen and by the justices of the court aforesaid fully understood: it is considered, adjudged and declared, that the said complaint does not come under the cognizance of the justices here present and that the same be and is hereby dismissed." R. I. Acts and Resolves, Oct. (2d Sess.) 1786, 6. In an argument in defense of the court before the legislature, one of the judges said: "The legislature has assumed a fact in their summons to the judges which was not justified or warranted by the record. The plea of the defendant in a matter of mere surplusage mentions the act of the General Assembly as unconstitutional and so void; but the judgment of the court simply is that the information is not cognizable before them. Hence it appears that the plea has been mistaken for the judgment." See *The Nation*, March 7, 1889.

[2] "Whereas," ran the resolution, "it appears that the honorable the judges of the Supreme Court of Judicature, at the last September term of said court in the county of Newport, have by the judgment of said court, adjudged an act of the supreme legislature of this state to be unconstitutional and so absolutely void; and whereas it is suggested that the said judgment is unprecedented in this state and may tend to abolish the legislative authority thereof: it is therefore voted and resolved that all the justices of said court be forthwith cited by the sheriffs of the respective counties in which they live or may be found, to give their immediate attendance upon this assembly, to assign the reason and grounds for the aforesaid judgment; and that the clerk of said court be directed to attend this assembly at the same time, with the records of the court which relate to the said judgment."

determination." He declined to do the latter, but declared that "the court was ever ready, as constituting the legal counsellors of the state, to render any kind of assistance to the legislature in framing new or repealing old laws."[1] An unsuccessful attempt was made to remove the judges who had possessed the courage to allow counsel to cast doubt upon legislative supremacy, but they served out the term for which they had been elected. As the election was by the legislature, they were not awarded a new term, but before the new judges took their seats the obnoxious law was repealed.[2]

In Virginia the first clear assertion by the courts of the power to declare a law void was in 1782. As early as 1772, in Robbins *vs.* Hardaway,[3] Mason had argued against the validity of an act which provided for the sale of the descendants of Indian women as slaves; but no decision was reached, as it was found that the statute had been repealed. He argued that the act was void because contrary to natural right and justice, and a violation of the duties and obligations which men owe to each other in a state of nature. In May, 1778, the legislature of Virginia passed an act of attainder against one Josiah Phillips, an outlaw who had been devastating the state. During the year Phillips was captured, convicted and executed for highway robbery, the act of attainder being disregarded. It is uncertain whether this neglect of the law was the voluntary act of the attorney-general, or whether the court refused to recognize the attainder.[4] Professor Tucker asserts[5] that the latter was the case and that the court directed the prisoner to be tried. If this is correct, the case antedates Trevett *vs.* Weeden. In 1776 a law was passed in Virginia taking from the executive the power of pardon in cases of treason. Under this act

[1] 2 Chandler's Criminal Trials, 327. No such practice appears to have prevailed before the Revolution. See Memorandum on the Legal Effect of Opinions given by Judges, by Prof. J. B. Thayer, p. 12.

[2] Consequently, Professor Bryce's statement that "they were replaced by a more subservient bench" is purely a matter of conjecture, as the new judges had no opportunity to consider these statutes.

[3] Jefferson's Reports (Va.), 109.

[4] See 4 Burk, 305–6.

[5] See Tucker's Blackstone, App. I, 293.

one Caton, having been convicted of treason, was pardoned by the House of Delegates without the concurrence of the Senate. The case reached the courts in 1782.[1] When the attorney-general moved for execution upon the prisoner, the latter pleaded the pardon of the House. Under the constitution as it then stood, the case was referred to the court of appeals for novelty and difficulty. There it was argued that the act of the assembly was contrary to the plain intent of the constitution and hence void. To the distinguished gentlemen who constituted the court of appeals in Virginia in 1782, this was a very disturbing question; but they met it with becoming boldness. Attorney-General Randolph, afterwards attorney-general and secretary of State of the United States, argued that whether the act was contrary to the spirit of the constitution or not, the court was not authorized to declare it void. The arguments at the bar must have been spirited, as they drew from the chief justice the somewhat hysterical statement: "If the whole legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal and, pointing to the constitution, will say to them: 'Here is the limit of your authority, and hither shall you go, but no further.'" The court did not decide the point, but Pendleton, the president, remarked that the ques tion of the power claimed for the court was "undoubtedly a deep, important, and, I may add, tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas." The report of the case adds: "Chancellor Blair, with the rest of the judges, was of the opinion that the court had power to declare any resolution of the legislature or of either branch of it, to be unconstitutional and void."

Six years later, in 1788, the question was again raised in the very interesting "Case of the Judges,"[2] which grew out of an attempt by the legislature to impose additional and extra-judicial duties upon the court. The judges addressed a remon-

[1] Commonwealth *vs.* Caton, 4 Call. (Va), 1. [2] 4 Call. (Va.), 135.

strance to the legislature, in which they expressed their regret at being obliged to pass upon the constitutionality of a law, but declared that the alternative was either to decide the question or to resign their offices, and that not until this dilemma presented itself was the question actually considered. The latter alternative would have been their choice, if they could have considered the question as affecting their individual interests only; but viewing it in relation to their offices, and finding themselves called by their country to sustain an important position as one of the pillars on which the great fabric of the government was erected, they judged that their resignation would subject them to the reproach of deserting their station and betraying the sacred interests of society intrusted to them. On that ground they found themselves obliged to decide the question, however their delicacy might be wounded or whatever temporary inconvenience might ensue, and in that decision to declare "that the constitution and the acts were in opposition; that they could not exist together, and that the former must control the operation of the latter." Thus, not until it became a question of self-preservation did the court grapple with what was indeed a "tremendous question." These views were again declared in several later cases and were directly enforced in 1793 in Kemper *vs.* Hawkins.[1]

In New York the question was first raised in the celebrated case of Rutger *vs.* Waddington, decided in 1784. After hearing a very able argument by Alexander Hamilton, the Mayor's Court of New York held unconstitutional and void the Trespass act, which authorized actions by owners against those who had occupied their houses under British orders during the British occupation. Hamilton argued that the law violated natural justice, and the decision seems to have been placed upon this ground. It was a time of great public excitement, and popular meetings were held to denounce the decision. The Assembly resolved that "it would render legislatures useless"; and a mass meeting of indignant citizens declared that "such power would

[1] 2 Va. Cas. 20. See also Turner *vs.* Turner, 4 Call. (Va.), 234 (1792); Page *vs.* Pendleton, Wythe's (Va.) Rep., 211 (1793).

be most pernicious."[1] The decision does not seem to have been taken very seriously even by its friends, as Hamilton tells us that he compromised subsequent suits based on the act.[2]

In 1792 the supreme court of South Carolina held an act of the colonial legislature of 1712 void, as in contravention of common right and of Magna Charta.[3] In North Carolina the power of the court to refuse to enforce a law because unconstitutional was elaborately argued and considered in 1787.[4] The court took the case under advisement and earnestly sought to avoid a decision on the constitutional question. After referring to these evasive manœuvres, the report of the case says:

> The court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislative and judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of the opinion the judges observed that

> the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the state, yet no objection of censure or respect could come in competition or authorize them to dispense with a duty they owed to the public in consequence of the trust they were invested with under the solemnity of their oaths.[5]

Massachusetts seems to have attempted to grant the power to the court by statute. In 1786, in an act repealing any laws of the commonwealth inconsistent with the enforcement of the treaty with Great Britain, it was enacted

> that the courts of law and equity within this commonwealth be, and they are hereby, directed and required in all cases and questions coming

[1] Rutger *vs.* Waddington, Dawson's Pamphlet, p. 44.

[2] Works, edited by J. C. Hamilton, V, 115, 116; VII, 197; 19 *American Law Review*, 180.

[3] Bowman *vs.* Middleton, 1 Bay, 252. [4] Bayard *vs.* Singleton, 1 Martin, 42.

[5] See Ogden *vs.* Witherspoon, 2 Hayward, 227 (1802).

before them respectively and arising from or touching the said treaty, to decide and adjudge according to the tenor, true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in any wise notwithstanding.[1]

IV.

When the convention met in 1787 the idea of controlling the legislature through the judiciary must have been familiar to most of the members, as it had been asserted in New Jersey, Virginia, New York, Massachusetts and North Carolina.[2] The discussion had caused much popular excitement and the doctrine met with general approval outside of the legislatures.[3] It was necessary to devise some plan which would protect the national and state governments in the exercise of the full measure of power assigned to each. Several propositions having this in view were submitted to the convention. One contemplated that the governors of the states should be appointed by the central government; another that the central legislature should have the power of repealing state laws; while a third provided for a council of revision of which the judiciary was to form a part. The last-mentioned plan was strongly urged by some of the most prominent men of the convention. Against its adoption it was argued that the courts already had control over the laws through the power they possessed of declaring them unconstitutional. Madison,[4] while admitting that the courts would possess this power, wished a tribunal for revision, as laws might be unjust, unwise, dangerous and destructive,

[1] 1 Laws, 311. Two years later the Supreme Judicial Court held an act unconstitutional. See letter of J. B. Cutting to Jefferson; Bancroft's History of the Constitution, II, 472–3.

[2] Chief Justice Brearley of New Jersey was a member of the convention.

[3] Mr. George Ticknor Curtis says: "The somewhat crude idea of making a negative on state legislation a *legislative* power of the national government shows that the discovery had not yet been made of exercising such a control through the judicial department." Narrative and Critical History of America, VII, 240; Constitutional History of the U. S., new ed., I, 345. This seems inconsistent with the facts stated above. See language of Gerry, Elliot's Debates, V, 151.

[4] Elliot's Debates, V, 346.

and yet not be so obviously unconstitutional as to justify the courts in refusing to give them effect.

The supremacy of the law and the preservation of the proper equilibrium between state and federal power required that there should be some authority competent to decide whether Congress or a state legislature had or had not in a particular instance transgressed the law of the constitution. Nothing could be gained by establishing a separate body of men to pronounce upon the constitutionality of laws. Such a tribunal would be as liable to err as the legislature. "*Quis custodiet custodes? Tribuni aut ephori?*" The peculiar training of the judges, "the middlemen" between "the pure philosophers and the pure men of government," fitted them for this duty.[1] That the courts would have this power under the constitution was generally admitted by the delegates. It was commented upon with approval in the constitutional convention by Gerry, Gouverneur Morris, Wilson, George Mason and Luther Martin; with disapproval by Mercer of Maryland and Dickinson of Delaware, who could not forget that the justiciary of Aragon became by degrees its lawgiver. In the state conventions, the matter was discussed in Connecticut by Ellsworth, who called the judiciary "a constitutional check"; in North Carolina by Davies; in Pennsylvania by Wilson; and in Virginia by Marshall, Randolph and Henry. The last named, a decided opponent of the constitution, was an earnest advocate of the independence of the judiciary. He believed that the judges should decide upon the constitutionality of the law, and feared that the national judiciary, as organized, would not possess sufficient independence for this purpose. The following is his language:

> The honorable gentleman did our judiciary honor in saying that they had firmness enough to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary so well constituted and so independent of the other branches as our state judiciary? Where

[1] Lieber, Civil Liberty, 162–4.

are your landmarks in this government? I will be bold to say you cannot find any.[1]

In *The Federalist*[2] the independence of the judiciary is elaborately discussed, and the existence of the power to pass upon questions of constitutionality seems to be taken for granted. It is there commented upon not as a mere possibility, but apparently in order to remove any lingering objections there might be to such a practice.[3]

In accordance with this idea, the Judiciary act of 1789 provided for a review in the Supreme Court of cases where the validity of a state statute or of any exercise of state authority should be drawn in question on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision should be in favor of validity.[4] The power appears to have met with approval in the federal courts, and it was boldly asserted as soon as the judges had acquired self-confidence. It must be remembered, however, that the federal judiciary was experimental. As De Tocqueville said: "Courts are the all-powerful guardians of a people which respect law; but they would be impotent against popular neglect and contempt." The nearest approach to a federal tribunal under the Confederation was the committee of appeals appointed by Congress in 1777, and its successor, the court of appeals, established in 1780. The career of these tribunals had not been such as to justify the new court in feeling that, as their apparent successor, it possessed a very great share of popular respect. The

[1] Elliot's Debates, II, 248.

[2] No. 78 and No. 80.

[3] 19 *American Law Review*, 184. For further illustration of the application of the doctrine, see Ham *vs.* McClaws, 1 Bay (S. C.), 93 (1792); White *vs.* Kendricks, 1 Brevard (S. C.), 469 (1805); Austin *vs.* Trustees, 1 Yeates (Pa.), 260 (1793); Respondent *vs.* Ducquet, 2 Yeates, 493 (1799). It met with much opposition in Pennsylvania. In 1808, in Emerick *vs.* Harris, 1 Binney, 416, the court considered it necessary to defend its position in a lengthy argument. The doctrine was opposed as late as 1843 in Commonwealth *vs.* Mann, 5 W. & S. 403.

[4] In 1824, Letcher of Kentucky introduced a resolution in Congress so to amend the law as to require more than a majority of the judges to declare a state law void. 8 Benton's Abridgment, 51. In 1830 an attempt was made to repeal this section (25) of the act. The bill was lost in the House, by a vote of 137 to 51; but many leading men voted with the minority. Sumner's Andrew Jackson (American Statesmen), 173.

only important decision of the committee of appeals and the injunction issued to enforce it were treated with contempt by a Pennsylvania court.[1]

The first case in which the power of the federal courts to decline to enforce an act of Congress was asserted well illustrates the prevailing idea as to the position of the judiciary and the extreme modesty of the judges. In March, 1792, Congress passed an act providing for the settlement of claims of widows and orphans barred by certain limitations, and regulating claims to invalid pensions. The act directed the United States circuit courts to pass upon such claims, but made their decision subject to review by the secretary of War and by Congress. In the circuit court for the district of New York, Chief Justice Jay, Justice Cushing and District Judge Duane filed an order declining to execute the act as judges, but declaring that

> as the objects of this act are exceedingly benevolent and do real honor to the humanity and justice of Congress; and as the judges desire to manifest on all proper occasions and in every proper manner their highest respect for the National Legislature, they will execute this act in the capacity of commissioners.

Justices Wilson and Blair and District Judge Peters of the circuit court for Pennsylvania, being anxious that the President should not misunderstand them, addressed a letter to the chief magistrate, explaining the position taken by them "on a late painful occasion." After laying down the general principles governing the distribution of the powers of government, and elaborating the importance of an independent judiciary and the reasons for their determination, the judges assured the President that, though it became necessary, it was far from pleasant to be obliged to act contrary either to the obvious directions of Congress or to a constitutional principle in their judgment equally obvious, and that the situation excited feelings in them which they hoped never to experience again.

Justice Iredell and District Judge Sitgreaves of the North Carolina circuit, before any case came before them, joined in

[1] Thirty years later the authority of the court of appeals was affirmed by the Supreme Court of the United States in U. S. *vs.* Peters, 5 Cranch, 115. See

an elaborate letter to the President explaining their conduct, expressing their doubts as to their powers under the law to act as commissioners and deploring their position.

> We beg to premise [wrote the learned judges] that it is as much our inclination as it is our duty, to receive with all possible respect every act of the legislature, and that we never can find ourselves in a more painful situation, than to be obliged to object to the execution of any law, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undeniably is.

The question reached the Supreme Court at the August term, 1792, on an application for a *mandamus*[1] to the district court for the district of Pennsylvania, commanding it to proceed and hear the petition of one Hayburn to be placed on the list as an invalid pensioner. Attorney-General Randolph entered into a very elaborate description of the powers and duties of the court and advised the execution of the law.[2] No doubt existed in the minds of the judges, yet so great was the desire to avoid a conflict that the motion was taken under advisement and held until the statute was amended.

Sections two, three and four of the act of 1792 were repealed at the next session of Congress. The repealing act provided another mode for taking the testimony and deciding upon the validity of claims to the pensions granted by the former law. The third section saved all rights to pensions which might be founded "upon any legal adjudication" under the act of 1792, and made it the duty of the secretary of War in conjunction with the attorney-general to take such measures as might be necessary to obtain an adjudication of the Supreme Court, "on the validity of such rights, claimed under the act aforesaid, by the determination of certain persons styling themselves commis-

Van Santvoord's Chief Justices, 202; Patterson, J., in Penhallow *vs.* Doane, 3 Dallas, 54. For history of these early courts, see J. F. Jameson in Essays in Constitutional History during the Formative Period; also 131 U. S. Reports, Appendix.

[1] Hayburn's Case, 2 Dallas (U. S.), 409.

[2] Randolph said of this argument: "The sum of my argument was an admission of the power [of the court] to refuse to execute, but the unfitness of this occasion." Conway's Edmund Randolph, 144–5.

sioners." The purpose evidently was to have it determined whether under the act conferring the power upon the circuit court, the judges of those courts, when refusing to act as courts, could legally act as commissioners out of court. In order to have this determined an amicable action was brought by the United States against one Yale Todd to recover money paid him under a finding of Chief Justice Jay and Judges Cushing and Law, acting as commissioners. After argument, judgment was rendered against the defendant. No opinion stating the grounds of the decision was filed, but the result was a determination that, as the power conferred by the act of 1792 was not judicial within the meaning of the constitution, the act was unconstitutional. Chief Justice Jay, and Justices Cushing, Wilson, Blair and Patterson were present at the decision, which seems to have been unanimous.[1]

In 1798 the question was again raised in the Supreme Court of the United States,[2] and it was held that there was no constitutional restriction to protect a state from passing a retroactive law affecting property right only. Mr. Justice Chase thought that a legislative act contrary to the first principles of the social compact could not be considered a rightful exercise of legislative authority. He was satisfied that the Supreme Court had no jurisdiction to determine that any law of the state legislature contrary to the constitution of the state was void, but declined to express an opinion whether they could declare void an act of Congress contrary to the federal constitution. Justices Cushing and Patterson concurred in the decision, but did not discuss the question. Mr. Justice Iredell, having gained confidence since 1792, said:

> If any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void; though I admit that, as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of

[1] The only report of this case is in a note to U. S. *vs.* Ferreira, 13 Howard, 40, 52.

[2] Calder *vs.* Bull, 3 Dallas (U. S.), 386.

their constitutional powers, the court cannot pronounce it to be void, merely because it is in their judgment contrary to the natural principles of justice.

As early as 1795 Justice Patterson, when on circuit, in a case growing out of the territorial controversy between Connecticut and Pennsylvania, had held the Pennsylvania "quieting and confirming act" unconstitutional and void.[1] In his elaborate charge to the jury, after referring to the unlimited power of the English Parliament and the nature of written and unwritten constitutions, the learned judge said:

I take it to be a clear position, that if a legislative act impugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority. It lies at the foundation of all law and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which in the discussion of questions of the present kind ought never to be lost sight of, that the judiciary in this country is not a subordinate but a co-ordinate branch of the government.

This is a very important advance from the position of the judges three years earlier. Yet in 1800, Mr. Justice Chase said:

Although it is alleged that all acts of the legislature in direct opposition to the prohibition of the constitution would be void, yet it still remains a question where the power resides to declare it void. It is indeed a general opinion, it is expressly admitted by all this bar, and some of the judges have individually in the circuits decided, that the Supreme Court can declare an act of Congress to be unconstitutional and therefore invalid; but there is no adjudication of the Supreme Court itself upon the point. I concur, however, in the general sentiment. . . .[2]

Whether this power could be employed to invalidate a law enacted previous to the adoption of the constitution was suggested, but not decided.

[1] Van Horn *vs.* Dorrance, 2 Dallas (Pa.), 304.

[2] Cooper *vs.* Telfair, 4 Dallas, 194. The learned judge had evidently forgotten the decision in United States *vs.* Todd.

Thus, the question was in a measure an open one when it came before the Supreme Court in the well-known case of Marbury *vs.* Madison, decided in 1803,[1] in which "the power and duty of the judiciary to disregard an unconstitutional act of Congress or of any state legislature were declared in an argument approaching to the precision and certainty of a mathematical demonstration."[2] President Adams nominated Marbury to a judicial office and, the Senate having confirmed the nomination, his commission was made out, signed and sealed, but not delivered. Upon the change of administration, Madison, secretary of State, refused to deliver it; whereupon Marbury, claiming that his title to the office was complete, made application to the Supreme Court for a writ of *mandamus* commanding the delivery of the commission. The court unanimously held that the legal right to the office had vested in Marbury, and that to withhold his commission was a violation of a legal right for which *mandamus* was the proper remedy; but that the provision of the Judiciary act purporting to give the Supreme Court jurisdiction to issue writs of *mandamus* in original proceedings was not warranted by the constitution and was therefore inoperative and void.

This opinion followed the practice of the English courts and subjected the ministerial and executive officers of the government to the control of the courts.[3] The language of Chief Justice Marshall is so clear and conclusive that I quote from it at some length:

> The question whether an act repugnant to the constitution can become the law of the land is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established, to decide it.
>
> That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the

[1] 1 Cranch, 137. [2] Kent's Commentaries, I, 453.

[3] Jefferson considered the opinion as to the legality of Marbury's claim "an *obiter* dissertation of the chief justice and a perversion of the law." Works, VII, 290.

government and assigns to different departments their respective powers. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like any other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . .

If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as though it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted upon. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . This is the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary acts of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law.

The power was never seriously questioned in the federal courts after the decision in Marbury *vs.* Madison, and was gradually established in all the states.[1]

The Supreme Court was from the first a Federalist institution and it applied to constitutional questions the Federalist principles

[1] See Cohen *vs.* Virginia, 6 Wheaton (U. S.), 264; Fletcher *vs.* Peck, 6 Cranch, 87; Story on the Constitution II, 367. For a list of cases in which the Supreme Court of the United States has held statutes unconstitutional, see 131 U. S. Reports, Appendix, p. ccxxxv.

of construction. This gave to the judiciary a political importance which Jefferson and his friends were not slow to appreciate. The Republican party came into power in 1800 by a majority so large that Jefferson in his inaugural address could say: "We are all Republicans — we are all Federalists"; meaning that the entire nation had become Republican. But this must have been with a mental reservation which excluded the federal judiciary. He realized perfectly well that his victory was incomplete so long as Marshall and his friends held the citadel of the Supreme Court. With the court under the control of this "arch-Federalist," the execution of the programme by which the federal government was to be reduced to its true proportions was impossible. Jefferson was an idealistic politician. He believed in the total depravity of his political opponents and in the perfection of his own idyllic theories of society and government. The means adopted to secure the triumph of these theories was apparently of minor importance. When the new party once secured control, slight irregularities could be corrected or forgotten. He now thought that the future prosperity of the country demanded restraint upon the power of the courts, and that in order to secure this, it was necessary to destroy their independence. In his opinion, a judiciary independent of the nation was a solecism.[1] That the country was with him, and would approve any plan having color of law, which would destroy what remained of the power of the Federalists, seemed in the light of the Republican majority beyond a doubt.

This control of the courts it was resolved to obtain through the process of impeachment. Adams' midnight judges were summarily disposed of. The law forbade the removal of the judge from office, but it did not forbid the removal of the office from the judge. This remedy, however, did not reach the real difficulty. The Supreme Court could not be abolished. Impeachment was thereupon adopted as a party weapon and was used first upon insane, inoffensive Judge Pickering, of the district court in New Hampshire. Success was achieved in this case without difficulty and the next move was against the able but

[1] Jefferson's Works, VII, 192.

violent Justice Chase of the Supreme Court. Chase had been guilty of partisan conduct on the bench, deserving of severe censure, but not such as involved any element of crime. Randolph in the House and Giles in the Senate undertook to establish the theory that the Senate, in trying impeachments, did not sit as a court and should discard any procedure analogous to that in a court of justice. The theory, as expressed by Giles, was that the independence of the judiciary was a pure figment of the imagination; that there was not a word in the constitution about it, and that the assertion of such a principle was merely an attempt by the judges to establish an aristocratic despotism in themselves. The power of impeachment was given without limitation to the House of Representatives. The power of trying impeachments was given equally without limitation to the Senate. And "if the judges of the Supreme Court should dare, as they had done, to declare an act of Congress unconstitutional, or to send a *mandamus* to the secretary of State as they had done," [1] it was the undoubted right of the House of Representatives to impeach them and of the Senate to remove them for giving such opinions, however honest or sincere they may have been in entertaining them.[2] Impeachment was not a criminal prosecution, and the conviction of a judge did not imply any criminality or corruption. It implied simply that the judge had opinions which the Senate considered unsound, and that his office was wanted for the purpose of giving it to some one who would fill it more acceptably to the party in power. A few members of the majority, however, considered this a dangerous doctrine, and would not concede that honest error of opinion was a ground for impeachment. The defence insisted that impeachment was restricted to misdemeanors indictable at law. The Senate became confused and never knew on which theory it proceeded. Chase was acquitted and the advocates of liberal impeachments were covered with ridicule.[3] Had Giles'

[1] J. Q. Adams, Memoirs, I, 322.

[2] Jefferson wrote as follows: "As for the safety of society we commit honest maniacs to Bedlam, so judges should be withdrawn from their bench, whose erroneous biases are leading us to destruction." Works, I, 82.

[3] Adams' History of the United States, II, ch. x.

doctrine been established in this instance, the next move would have been against the chief justice, for daring to declare an act of Congress unconstitutional. This, however, was the final struggle and the power of the federal courts was never afterwards seriously questioned by Congress.[1]

The doctrine of a co-ordinate judiciary met with violent opposition in some of the Western states, where the people lacked the respect for law common in the older communities. The spirit of democracy generated in the wilds of a new country encouraged an exaggerated reverence for the rights of a majority. That a judge should assume to disregard the will of the people was to them incomprehensible, and deserving of nothing less than impeachment.[2] It was difficult for the freeman of the West to realize that by the constitution the sovereign people had not only limited their government but had also secured themselves against the whims of a majority.[3]

In 1805 the legislature of Ohio enacted a law defining the duties of the justice of the peace. During the following year Judge Pease of the circuit court decided that certain portions of this statute were repugnant to the constitution of the United States and therefore void. This decision was soon after affirmed by the supreme court of the state. As the act itself was of minor importance, the public clamor must have been due entirely to indignation at the assumption of power by the courts. Resolutions looking to the impeachment of the judges were introduced in the legislature of 1807, but were not acted upon

[1] The conflict between the Supreme Court of the United States and the state of Georgia, encouraged by the national executive, suggested a new theory. In 1838 Holsey of Georgia, who, according to Adams, "affects to be a systematic lawyer," argued that the three departments of the federal government must concur in holding a state law unconstitutional in order to set it aside. Adams' Memoirs, IX, 548–9. See Annals of Congress, 2d session, 7th Congress, pp. 141, 527, 729, 825. Lloyd's Debates, I, 219, 596; II, 284, 327.

[2] *Cf.* the recent resolution of the Farmers' Alliance of Minnesota, protesting against the decision of the Supreme Court in the "New Granger cases." [*Infra*, RECORD OF POLITICAL EVENTS, United States, Farmers' Interests.]

[3] Webster, Luther *vs.* Borden, 7 Howard (U. S.). The self-imposed checks of the constitution are "obstacles in the way of the people's whims, not of their will." Lowell, Democracy and Other Addresses, p. 24.

till the following session, when two of the judges were impeached, but upon trial were acquitted.[1]

In the new state of Kentucky the firmness of the judges was put to a severe test. The majority of the people of the commonwealth belonged to the debtor class. The times were hard and the cry for more money was heard in the halls of legislation. In answer to the popular clamor, the legislature of 1820–21 chartered an institution to be known as the Bank of the Commonwealth. This remarkable bank was to be relieved from all danger of suspension by the very simple expedient of releasing it from any obligation to redeem its notes in specie. Certain lands of the state were pledged for their ultimate redemption, and in the meantime the duties of the bank were confined to the issuing of paper money. This paper was made receivable for public debts and taxes; private creditors could accept it at par or wait two years before taking any steps for the collection of their debts. Naturally this method of relief was not satisfactory to the creditor class. The question of the power of the legislature to pass the law was soon raised, and Judge Clark of the state circuit court held the law unconstitutional.[2] The judge was cited before the House of Representatives, and an effort was made to remove him; but the necessary two-thirds majority could not be obtained.[3] The message of Governor Adair in 1823 approved the relief system and denounced the courts for declaring the law unconstitutional. In the same year the court of appeals held the relief laws void because contrary to the constitution of the United States.[4] The people regarded the decision as an usurpation and an assault upon their liberties. The legislature affirmed the constitutionality of the laws, and an issue was made upon the right of a court to annul a law duly passed by the representatives of the people. The state elections

[1] *Western Law Monthly*, June, 1863. Cooley, Constitutional Limitations (4th ed.), 160*.

[2] See 23 Niles' *Register*, Supplement, 153, for the decision, the legislature's proceedings and the judge's defence. The power had been exercised as early as 1801 in Stidger *vs.* Rogers; Kentucky Decisions, 52.

[3] The vote was 59 to 35 in favor of removal.

[4] Lapsley *vs.* Breashear, 4 Litt. (Ky.), 47.

of 1824 were fought upon this issue. The relief party struggled to win a majority of the legislature large enough to remove the judge. They succeeded in getting a majority, but not the necessary two-thirds. They then adopted a new plan. Following the precedent of the repeal of the federal Judiciary act in 1803, they repealed the act by which the court of appeals had been organized and through a new law constituted a new court. The old court held this act unconstitutional. The adherents of the different courts became known as the "old court" and "new court" parties, and for a time the state was in an uproar. The "old court" party at last prevailed and the acts of the new court have since been disregarded.[1]

V.

An unconstitutional law is a law which either assumes power not legislative in its nature or is inconsistent with some provision of the federal or state constitution.[2] In considering a state statute for the purpose of determining its validity, the federal court acts under an express law granting the power.[3] Its duty is to determine whether such state statute is contrary to the constitution of the United States, and if it is so, to disregard it. A federal court has no authority to declare a state law void because it conflicts with the state constitution.[4] In dealing with an act of Congress, it is necessary to look only to the constitution of the United States and to determine whether or not the power sought to be exercised is expressly or impliedly granted by that instrument. A state court, construing a state law, has a more complicated duty to perform. It must determine not only whether the act contravenes the federal constitution, but also whether it is in violation of any express or implied prohibition of the state constitution.

[1] Collins' History of Kentucky (rev. ed.), I, 218, 222.
[2] Commonwealth *vs.* Maxwell, 27 Pa. St. 444.
[3] Sec. 25 of the Judiciary act of 1789.
[4] Hunt *vs.* Lamphire, 3 Peters (U. S.), 280.

The courts do not sit primarily to decide questions of constitutionality. Their domain is law, not politics. Although the political importance of the doctrine we are now considering is very great, the doctrine is purely legal. A statute can be declared unconstitutional only by refusing to enforce it in a litigated case, or by refusing to recognize it as protecting an officer who attempts to enforce it. The act of the legislature, being in the opinion of the court in excess of its constitutional authority, is simply disregarded. The case before the court is decided, and the constitutional decision is found in the reasons assigned for the judgment.[1]

There are cases, however, in which acts of Congress involving constitutional questions are not subject to review in the courts. Such may arise under the provision of the constitution that the United States shall guarantee to every state in the Union a republican form of government. Questions arising under this section are purely political and wholly beyond the province of the judiciary.[2] A political act cannot be restrained by the judiciary even though it violates the constitution, or a treaty or law made in pursuance thereof.[3] The levying of a protective tariff and the abuse of the power of taxation, are illustrations of political acts which are beyond the power of the courts.[4]

To avoid the uncertainty and inconvenience arising from the practice of permitting an unconstitutional enactment to stand on the statute books as valid until the question is raised in some particular case, various attempts have been made to require the courts or judges to act as general governmental counsel, giving to the executive and legislature in advance opinions upon the constitutionality of proposed measures; but it is now well settled that this would impose other than judi-

[1] For valuable discussions of the theory upon which the courts act, see Bryce, American Commonweath, I, pp. 246–7; Dicey, Law of the Constitution (3d ed.), p. 149; Lowell, Essays on Government, pp. 104, 119; Woolsey, Political Science, II, p. 333; Maine, Popular Government, pp. 223, 224.

[2] Luther *vs.* Borden, 7 Howard (U. S.), 1.

[3] The Cherokee Nation *vs.* Georgia, 5 Peters (U. S.), 1.

[4] See Madison's Works, IV, 144.

cial duties upon the judiciary. Soon after the establishment of the national government, Washington asked the opinion of the judges of the Supreme Court upon various questions arising out of the treaty with France.[1] Having some doubts as to the course to be pursued, they asked for delay to consult with absent associates. To this the President assented. Marshall in his *Life of Washington* writes:

> About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the executive. Considering themselves merely as constituting a tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics, by declaring their opinion on questions not growing out of the case before them.

A few of the state constitutions require that the opinions of the judges be taken on some occasions by the legislature and the executive.[2] Such opinions are generally held to be advisory and not binding upon the courts in subsequent causes.[3]

[1] Jefferson's Works, IV, 22.

[2] Massachusetts (pt. ii, ch. iii, sec. 2); New Hampshire (1784, pt. ii, title, judiciary power, sec. 74); Maine (art. vi, sec. 3); Rhode Island (art. x, sec. 3); Florida (1868, art. v, sec. 16); South Dakota (art. v, 13). The constitution of Colorado (amendment, 1886) provides that "the supreme court shall give its opinion upon important questions upon solemn occasions, when required by the governor, the senate or house of representatives; and all such opinions shall be published in connection with the reported decisions of the court." This is the only provision which calls for the opinion of the *court*.

[3] In Taylor *vs.* Place, 4 R. I. 324, the court, in dealing with a question on which an opinion had been given, said: "This is the first time since the adoption of the constitution that this question has been brought judicially to the attention of this court. The advice or opinion given by the judges of this court, when requested, to the governor or to either house of the assembly, under the third section of the tenth article of the constitution, is not a decision of this court; and given as it must be without the aid which the court derives in adversary cases from able and experienced counsel, though it may afford much light from the reasoning or research displayed in it, can have no weight as a precedent." A contrary rule prevails in Maine (70 Me. 583; 1880) and in Colorado (*In re* Senate Resolution, *etc.*, 21 Pac. Rep. 478). In the latter case, the chief justice, after referring to the fact that "it is the court and not the justices, which must answer," says that "these opinions have all the force and effect of judicial precedents." The general question is fully discussed, and the authorities reviewed and carefully analyzed by Prof. J. B. Thayer, in his pamphlet entitled, Memorandum on the Legal Effect of Opinions given by Judges (Boston, 1885).

Courts do not exist for the purpose of watching over the general rights of citizens, nor are they instituted for the purpose of regulating and restraining the other co-ordinate departments of government. As against the legislature, constitutional rights only will be protected by the courts. In each state there are two constitutions, one written, the other unwritten. The latter is the outcome of social and political forces in history. It is a political organism, the constitution of the people as distinguished from the constitution of their government. In the more common acceptation, however, a constitution is a "systematic description of such a growth in the shape of a *formula* addressed to the understanding."[1] It is the written or secondary constitution which the courts guard. The oath of office does not bind a judge to protect and obey the primary, organic, unwritten constitution, wherein are found the general principles of justice and humanity not embodied in the written instrument. The protection of these fundamental principles has not been delegated, but is reserved to the people in their sovereign capacity. If either of the departments among which the delegated powers are distributed attempts to exceed its authority and violate fundamental principles, the remedy is in the hands of the people; and as no department will be presumed to violate these principles, no department will undertake to say that another has done so.

The courts cannot act until a party has attempted to use the judiciary as an instrument for the enforcement of rights supposed to have been created or recognized by a statute, or for the defence of some constitutional right which would be violated by the enforcement of a statute. By the refusal to recognize or to enforce a law, it is annulled, and this decision, by virtue of the doctrine of precedent, is generally followed in similar cases in the future. Hence, it is useless to institute new cases and the law becomes a dead letter. This is the exercise of the ordinary judicial function of deciding between conflicting laws, and the legislature cannot, by a contrary conclusion, affect the decision.

[1] Jameson, Constitutional Conventions (2d ed.), p. 67; Brownson, The American Republic, p. 218.

As a rule, the judges have exercised this great power carefully and with due respect to the legislature. Some courts have gone so far as to adopt a rule that they will not hold a statute unconstitutional by a majority of a mere quorum, but will postpone the hearing until the wisdom of a full bench can be brought to bear upon the question.[1] But this is a mere rule of propriety, not of constitutional obligation. It is a well established rule that the question of constitutionality will not be decided unless it is necessary to the determination of the action. To quote from the language of the supreme court of Indiana:

> While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department, to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial question is entitled.[2]

If any other question is presented by the record upon which the judgment can be rested, the constitutional question becomes immaterial.

Another important limitation upon the action of the courts is the presumption that a statute is valid until it is complained of by some one whose rights are invaded. A party whose rights are not affected by the statute cannot be heard against its constitutionality.[3] The statute is also given the benefit of all reasonable doubt. When the courts are called upon to consider the validity of a statute, they will, said Chief Justice Shaw,

> approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention

[1] Briscoe *vs.* Bank, 8 Peters (U. S.), 118. [2] Hoover *vs.* Wood, 9 Ind. 287.

[3] In Wellington, Petitioner, 16 Pick. (Mass.), 87, 96, the court says: "*Prima facie*, and on the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows as a legal inference from this proposition that this ground of avoidance can be taken

can throw any new light on the subject; and never declare a statute void, unless the nullity and invalidity of an act are placed in their judgment beyond reasonable doubt.[1]

The legislature must be presumed to have acted with integrity and with a desire to keep within the bounds of the constitution,[2] and so acting, deliberately to have solved their own doubts in favor of the constitutionality of the act. Whatever weight the courts are justified in giving to the fact that a statute has received the approval of the legislative and executive departments, is due to this presumption, that they have acted in good faith and have actually considered the question with care. This weight may be overbalanced only by the duty resting upon the courts to give the instrument from which they derive their powers the benefit of the doubt, when a question of conflict occurs.[3]

A statute must always be construed according to the legislative intent. The presumption is that the law was intended to take effect, and the court must, if possible, so construe it as to give it effect. The motives of the legislature cannot be inquired into by the courts, even where fraud is alleged. The presumption that a co-ordinate department has acted in good faith is conclusive. "We are not at liberty," said Chief Justice Chase, "to inquire into the motives of the legislature. We can only examine into its power under the constitution." Where the power exists, the courts are not at liberty to inquire into the proper exercise of that power. They cannot usurp the inquisitorial office of investigating the good faith of the legislature in the discharge of its duties. The responsibility for such discharge is not to the courts, but to the people, from whom the legislative powers are derived.

That a statute is unjust, oppressive, or in violation of some supposed natural, social or political right not protected by the written constitution, is not sufficient ground for holding it

advantage of by those only who have a right to question the validity of the act, and not by strangers."

[1] Wellington, Petitioner, 16 Pick. 95. *Cf.* the Sinking Fund Cases, 99 U. S. 700.

[2] United States *vs.* Harris, 106 U. S. 635, Woods, J.

[3] See Osburn *vs.* Staley, 5 W. Va. 85.

unconstitutional.[1] Nor is it sufficient that a statute violates the spirit supposed to pervade the constitution. This spirit is too evanescent to be dealt with by the courts. Attempts have frequently been made to have acts declared unconstitutional because contrary to the fundamental principles of republican government. But this reason involves a purely political question, falling within the province of the legislature. These fundamental principles are vague and are subject to variation with changes of public policy. The best established general principles are subject to reasonable exceptions; and the courts are not justified in saying that a certain act is not such an exception.[2]

It is not necessary, however, to the unconstitutionality of an act that it be in conflict with some express words of the written constitution. It is equally void if in conflict with implied provisions, or if inconsistent with some provision which confers the power sought to be exercised by the legislature upon some other department of the government, or if there is a failure to observe the forms in accordance with which the authority is to be exercised. Where judicial power is granted to the judiciary, it is impliedly denied to the executive and legislature. The general assignment of governmental powers to the three departments is equivalent to the exclusive grant to each of the whole authority naturally pertaining to its character.

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[1] Sharpless *vs.* Mayor, *etc.*, 21 Pa. St. 160–4, Block, C. J. "The rule of law upon the subject," says Judge Cooley (Constitutional Limitations, 204), "appears to be that except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case."

[2] In the License Tax Cases, 5 Wall. 469, Chief Justice Chase said: "There are undoubted fundamental principles of morality and justice, which no legislature is at liberty to disregard, but it is equally undoubted that no court except in the clearest cases, can possibly impute the disregard of these principles to the legislature. This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision."